

UNITED STATES COURT OF APPEALS **October 20, 2011**

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

JOEL SOTO,

Movant.

No. 11-4165
(D.C. No. 2:11-CV-00698-TC)
(D. Utah)

ORDER

Before **LUCERO, TYMKOVICH, and GORSUCH**, Circuit Judges.

Joel Soto, a federal prisoner appearing pro se, has filed a motion for remand challenging the transfer to this court of a post-conviction motion he filed in the district court. In May 2011, this court denied Mr. Soto authorization to file a second or successive 28 U.S.C. § 2255 motion. He then filed a motion captioned as a 28 U.S.C. § 2241 writ of habeas corpus. We conclude that the district court correctly ruled that this motion constituted an unauthorized second or successive § 2255 motion, and we deny the motion for remand.

Mr. Soto was convicted in 2007 of possession of 50 grams or more of methamphetamine with intent to distribute and his conviction was affirmed on direct appeal. *United States v. Soto*, 297 F. App'x 752, 753 (10th Cir. 2008). He filed his first § 2255 motion in January 2009, asserting ineffective assistance of trial counsel, which was denied. *See United States v. Soto*, 374 F. App'x 785,

786-87 (10th Cir.), *cert. denied*, 130 S. Ct. 3401 (2010) (denying a certificate of appealability).

In April 2011, Mr. Soto sought authorization to file a second or successive § 2255 motion, again seeking to present a claim of ineffective assistance of trial counsel based on evidence that his trial counsel had been suspended from the practice of law. We denied authorization because this evidence was not “sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Mr. Soto] guilty of the offense.” *See In re Soto*, No. 11-4084, slip. op. at 2 (May 31, 2011) (quoting 28 U.S.C. § 2255(h)(1)). In this regard, we noted that Mr. Soto’s attorney was suspended after Mr. Soto’s conviction and the attorney’s suspension was discoverable evidence at the time Mr. Soto filed his first § 2255 motion. *Id.* at 2-3.

Mr. Soto then filed the motion at issue, which he characterized as a § 2241 petition. In it, he contended that he was actually innocent under *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (holding that police may not search a vehicle incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle) and that he received ineffective assistance of counsel because counsel did not inform him of the investigation that led to his ultimate suspension. The district court ruled that Mr. Soto’s purported § 2241 motion constituted an unauthorized second or successive § 2255 motion

because it challenged Mr. Soto's conviction, not the execution of his sentence.

The district court transferred it to this court.¹

Mr. Soto challenges that transfer in his remand motion. He contends that his § 2241 petition and its proposed issues are not subject to the authorization requirements of § 2255(h). He is mistaken.

"A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity," whereas a § 2255 motion challenges the legality of a prisoner's detention pursuant to a federal court judgment. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). A motion filed pursuant to § 2255 is the exclusive remedy for testing the validity of a federal judgment and sentence, and supplants a § 2241 remedy unless the § 2255 remedy is shown to be "inadequate or ineffective." *Carvalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999). Section 2241 "is not an additional, alternative, or supplemental remedy" to § 2255. *Id.* (internal quotation omitted).

Mr. Soto's motion does not challenge the manner in which his federal sentence is being executed; rather, he is clearly attacking his conviction. The fact

¹ The district court erroneously stated that Mr. Soto's unauthorized motion "must be transferred" to this court. Order at 2. To the contrary, we have held that district courts should not automatically transfer unauthorized successive motions to this court for authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). A district court should dismiss an unauthorized second or successive motion for lack of jurisdiction and should only transfer an unauthorized motion to this court for authorization if it is in the interests of justice to do so, such as where the claims alleged are likely to have merit. *Id.*

that § 2255 bars Mr. Soto from again challenging his conviction in a second § 2255 motion does not render § 2255 an ineffective or inadequate remedy. *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011), *petition for cert. filed* (U.S. Aug. 24, 2011) (No. 11-249).

Because Mr. Soto's post-conviction motion attacked the legality of his conviction, § 2255 is his exclusive remedy. After a federal prisoner has filed an initial § 2255 motion, he may not file a second or successive § 2255 motion unless this court first certifies that it presents "claims involving either newly discovered evidence strongly suggestive of innocence or new rules of constitutional law made retroactive by the Supreme Court." *Prost*, 636 F.3d at 581; *see also* § 2255(h) (listing authorization criteria). Thus, the district court correctly ruled that the motion constituted an unauthorized second or successive § 2255 motion. Mr. Soto has neither asserted nor demonstrated that he is entitled to authorization under § 2255(h) to file a second or successive § 2255 motion.

Accordingly, Mr. Soto's motion for remand is DENIED and this matter is DISMISSED.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk